QVC Rock Products Sdn Bhd v Pohmix Kuari Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCvC)(W)-724–04 OF 2022
SUPANG LIAN, HASHIM HAMZAH AND LIM CHONG FONG JJCA
22 JANUARY 2024

Contract — Agreement — Sale and purchase agreement — Sale of quarrying operations and assets — Appellant rescinded contract for second lot notwithstanding contract for first lot was being performed — Whether there was divisibility of contract under umbrella agreement — Whether there was negligent misrepresentation — Whether agreement tainted with illegality

By an agreement between the respondent and JRNT Niaga Sdn Bhd ('JRNT'), the respondent was given the right to carry out quarrying operations on 40 acres of a rock quarry ('the land'). The 40 acres of land comprised of an area of 30 acres ('Lot A') and another area of ten acres ('Lot X'). The respondent then went into financial difficulties and decided to sell its right in carrying out the quarrying operations as well as its quarrying assets such as machineries, equipment and plant. The appellant was approached by the respondent and negotiations took place on the sale of the quarrying operations and assets. As a result, the appellant appointed a surveyor to carry out a survey on the land. Upon the conclusion of the survey, the appellant notified the respondent that the appellant was interested in Lot A but not Lot X and requested the respondent to source for an alternative area equivalent to the size of Lot X. Consequently, the respondent identified another area of ten acres ('Lot B') which was adjacent to Lot A and caused JRNT to apply to the Bera Land Office for a new temporary occupational license to be granted for Lot B. The parties thereafter executed a sale and purchase agreement ('SPA') for the sale of the quarrying operation and assets of Lot A and Lot B at the consideration of RM4,075,000. Upon the execution of the SPA, the appellant paid the respondent the sum of RM600,000 pursuant to the SPA and the quarrying operations of Lot A was handed over by the respondent to the appellant. Subsequently, the appellant further paid the respondent several times totalling to RM960,000. The temporary occupational license for Lot B was obtained and the respondent hence requested for payment of the balance purchase price of RM2,559,500 due from the appellant pursuant to the SPA. However, the appellant discovered that Lot B was not in pristine condition but had been quarried already by five acres. There were thereafter negotiations between the parties for a discount on the purchase price but to no fruition. After an independent survey of Lot B was carried out, the appellant wrote to the respondent that Lot A and Lot B were made up of divisible contracts having consideration of RM1.2m and RM2,875,000 each with their own condition

precedent prescribed in the SPA respectively. By reason of the non-pristine condition of Lot B that was already quarried as found, the appellant accordingly rescinded the second Lot B contract notwithstanding that the first Lot A contract was being performed. The respondent refuted the appellant's stand and therefore claimed against the appellant the sum of RM2,528,162.45. Since the appellant failed, refused or neglected to pay the respondent as claimed, the respondent instituted the suit in the High Court. The respondent pursued its claim for debt overdue pursuant to the SPA. In defence, the appellant opposed the claim premised on severability of contract and negligent misrepresentation that Lot B was in pristine and unquarried condition by the respondent. Thus, the appellant claimed that it was entitled to terminate the SPA and accordingly counterclaimed. The learned judicial commissioner allowed the respondent's claim and dismissed the appellant's counterclaim. Hence, this appeal. The appellant argued on the issues of: (a) divisibility of the contract under the umbrella SPA; (b) negligent misrepresentation; and (c) illegality of the SPA.

Held, dismissing the appeal:

(1) Based on the interpretation of cl 3 of the SPA, there was no separate consideration provided for Lot A and Lot B respectively. The consideration therein was merely for a lump sum price of RM4,075,000 for quarrying operations of both Lot A and Lot B as well as purchase of machinery and equipment. The appellant unilaterally attempted to allocate RM1.2m and RM2,875,000 as consideration for quarrying operations of Lot A and Lot B respectively but that did not make reasonable business common sense in view of the size of Lot A and Lot B where the former was indisputably much larger than the latter. The appellant actually equated the payment terms and condition precedent provisions in cll 4 and 5 of the SPA as consideration for the quarrying operations of Lot A and Lot B. However, based on the interpretation of these clauses, they dealt with the timing of part payments of the lump sum consideration of RM4,075,000 prescribed in cl 3 of the SPA only. They did not and must not be confused of being the consideration for the quarrying operations of Lot A and Lot B. In the premises, the SPA was not a divisible contract (see paras 35–37).

(2) The SPA was not a contract which was of *uberrimae fidei* (utmost good faith). Thus, the appellant must itself be aware and make its own requisite inspection and inquiry on both Lot A and Lot B including the physical nature of the sites before entering into the SPA. The failure of the appellant to carry out its physical visual inspection as well as preliminary survey of both Lot A and Lot B was hence fatal to its pleaded claim based on negligent misrepresentation. Additionally, by cl 15.2 of the SPA, the appellant had covenanted non-reliance on any representation made by the respondent; thus, the appellant must be accordingly estopped from

pleading and relying on negligent misrepresentation of the respondent as so pleaded. Consequently, it followed that the appellant's rescission or termination of the SPA to deny payment to the respondent was baseless and accordingly bad (see paras 42–44).

(3) The SPA was not ex facie illegal or that the object and consideration thereof contravened s 24 of the Contracts Act 1950. The consideration of the SPA was purely commercial in nature, viz the sale of quarrying operations. Even if there had been illegal quarrying as alleged by the appellant, the resultant consequence may subject the quarrying operator to criminal penalty under the relevant statutory laws but did not affect the sanctity or validity of the SPA (see paras 47–48).

[Bahasa Malaysia summary

Melalui satu perjanjian antara responden dan JRNT Niaga Sdn Bhd ('JRNT'), responden diberi hak untuk menjalankan operasi kuari di atas 40 ekar kuari batu ('tanah'). Tanah seluas 40 ekar itu terdiri daripada kawasan seluas 30 ekar ('Lot A') dan satu lagi keluasan sepuluh ekar ('Lot X'). Responden kemudiannya mengalami masalah kewangan dan memutuskan untuk menjual haknya dalam menjalankan operasi pengkuarian serta aset pengkuariannya seperti mesin, peralatan dan kilang. Perayu telah didekati oleh responden dan rundingan telah berlaku mengenai penjualan operasi kuari dan aset. Hasilnya, perayu melantik juruukur untuk menjalankan tinjauan ke atas tanah tersebut. Selepas tamat tinjauan tersebut, perayu memberitahu responden bahawa perayu berminat dengan Lot A tetapi bukan Lot X dan meminta responden mencari kawasan alternatif yang bersamaan dengan saiz Lot X. Oleh itu, responden mengenal pasti sepuluh ekar kawasan lain ('Lot B') yang bersebelahan dengan Lot A dan menyebabkan JRNT memohon kepada Pejabat Tanah Bera untuk mendapatkan lesen pendudukan sementara baru untuk Lot B. Pihak-pihak selepas itu melaksanakan perjanjian jual beli ('PJB') untuk penjualan operasi kuari dan aset Lot A dan Lot B dengan pertimbangan RM4,075,000. Selepas pelaksanaan PJB, perayu membayar responden sejumlah RM600,000 menurut PJB dan operasi kuari Lot A telah diserahkan oleh responden kepada perayu. Selepas itu, perayu seterusnya membayar responden beberapa kali berjumlah kepada RM960,000. Lesen pendudukan sementara untuk Lot B telah diperolehi dan oleh itu responden meminta bayaran baki harga belian sebanyak RM2,559,500 terhutang daripada perayu menurut PJB. Walau bagaimanapun, perayu mendapati bahawa Lot B tidak berada dalam keadaan asli tetapi telah dikuari seluas lima ekar. Selepas itu, terdapat rundingan antara pihak untuk mendapatkan diskaun ke atas harga pembelian tetapi tidak membuahkan hasil. Selepas tinjauan bebas ke atas Lot B dijalankan, perayu menulis kepada responden bahawa Lot A dan Lot B terdiri daripada kontrak boleh bahagi dengan balasan RM1.2m dan RM2,875,000 setiap satu dengan syarat mereka sendiri yang ditetapkan dalam PJB. Oleh sebab keadaan Lot B yang tidak asli yang telah dikuari seperti yang ditemui,

perayu dengan sewajarnya membatalkan kontrak Lot B kedua walaupun kontrak Lot A pertama sedang dilaksanakan. Responden menafikan pendirian perayu dan oleh itu menuntut terhadap perayu sejumlah RM2,528,162.45. Oleh kerana perayu gagal, enggan atau cuai membayar responden seperti yang didakwa, responden memulakan saman di Mahkamah Tinggi. Responden meneruskan tuntutannya untuk hutang tertunggak menurut PJB. Dalam pembelaan, perayu menentang tuntutan berdasarkan kebolehasingan kontrak dan salah nyata cuai bahawa Lot B berada dalam keadaan asli dan tidak dikuari oleh responden. Oleh itu, perayu mendakwa bahawa ia berhak untuk menamatkan PJB dan dengan itu menuntut balas. Pesuruhjaya kehakiman yang bijaksana membenarkan tuntutan responden dan menolak tuntutan balas perayu. Oleh itu, rayuan ini. Perayu berhujah mengenai isu: (a) kebolehpecahan kontrak di bawah gabungan PJB; (b) salah nyata cuai; dan (c) menyalahi undang-undang PJB.

Diputuskan, menolak rayuan:

(1) Berdasarkan tafsiran klausa 3 PJB, tiada pertimbangan berasingan yang disediakan untuk Lot A dan Lot B. Pertimbangan di dalamnya adalah semata-mata untuk harga sekaligus RM4,075,000 untuk operasi kuari kedua-dua Lot A dan Lot B serta pembelian mesin dan peralatan. Perayu secara unilateral cuba memperuntukkan RM1.2m dan RM2,875,000 sebagai balasan untuk operasi pengkuarian masing-masing Lot A dan Lot B tetapi ia tidak masuk akal perniagaan yang munasabah memandangkan saiz Lot A dan Lot B di mana Lot A tidak dapat dinafikan jauh lebih besar daripada Lot B. Perayu sebenarnya menyamakan terma dan syarat pembayaran peruntukan terdahulu dalam klausa 4 dan 5 PJB sebagai balasan untuk operasi pengkuarian Lot A dan Lot B. Walau bagaimanapun, berdasarkan tafsiran klausa ini, mereka berurusan dengan masa sebahagian pembayaran daripada balasan sekaligus sebanyak RM4,075,000 yang ditetapkan dalam klausa 3 PJB sahaja. Mereka tidak dan tidak boleh keliru dengan menjadi pertimbangan untuk operasi pengkuarian Lot A dan Lot B. Dengan premis itu, PJB bukanlah kontrak yang boleh dibahagikan (lihat perenggan 35–37).

(2) PJB bukanlah kontrak *uberrimae fidei* (suci hati). Oleh itu, perayu sendiri mesti sedar dan membuat pemeriksaan dan siasatan yang diperlukan sendiri ke atas kedua-dua Lot A dan Lot B termasuk sifat fizikal tapak sebelum memeterai PJB. Kegagalan perayu untuk menjalankan pemeriksaan visual fizikalnya serta tinjauan awal bagi kedua-dua Lot A dan Lot B adalah fatal kepada tuntutan yang diplidkan berdasarkan salah nyata cuai. Selain itu, mengikut klausa 15.2 PJB, perayu telah berjanji tidak bergantung pada sebarang representasi yang dibuat oleh responden; oleh itu, perayu hendaklah dengan sewajarnya dihentikan daripada membuat pengakuan dan bergantung kepada salah nyata cuai terhadap responden seperti yang diplid. Akibatnya, ia berikutan bahawa

pembatalan atau penamatan PJB perayu untuk menafikan pembayaran kepada responden adalah tidak berasas dan sewajarnya salah (lihat perenggan 42–44).

(3) PJB tidak secara *ex facie* menyalahi undang-undang atau objek dan pertimbangannya melanggar s 24 Akta Kontrak 1950. Pertimbangan PJB adalah bersifat komersial semata-mata, iaitu penjualan operasi kuari. Walaupun terdapat pengkuarian haram seperti yang didakwa oleh perayu, akibat yang terhasil boleh menyebabkan pengendali kuari dikenakan hukuman jenayah di bawah undang-undang berkanun yang berkaitan tetapi tidak menjejaskan kesucian atau kesahihan PJB (lihat perenggan 47–48).]

Cases referred to

Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors [2022] 1 MLJ 701, FC (refd)

Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors [2021] 2 MLJ 374, FC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285; [1985] CLJ Rep 77, FC (refd)

Gemakota Enterprise Sdn Bhd v Public Bank Bhd [1998] MLJU 389; [1998] 4 CLJ Supp 476, HC (distd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Pohmix Sdn Bhd v QVC Rock Products Sdn Bhd [2022] MLJU 1147; [2022] CLJU 1127, HC (refd)

Richard Curtis & Co v Khatijah Abdul Majid [2012] 7 CLJ 878, HC (refd)

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)

Sabah Development Bank Berhad v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd) [2020] MLJU 228, FC (refd)

Sim Thong Realty Sdn Bhd v The Kim Dar @ Tee Kim [2003] 3 MLJ 460; [2003] 3 CLJ 227, CA (refd)

South Asia Noble Sdn Bhd v Corak Prospek Binaan Sdn Bhd & Anor [2018] MLJU 1260; [2018] 1 LNS 1324, HC (refd)

Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals [2021] 3 MLJ 914; [2021] 2 CLJ 318, FC (refd)

Legislation referred to

Contracts Act 1950 s 24

Appeal from: *Pohmix Sdn Bhd v QVC Rock Products Sdn Bhd* [2022] MLJU 1147 (High Court, Shah Alam)

Low Kin Fai (with Chong Ee Wen) (Low & Fong) for the appellant.
Francis Tan (with Norhamizah bt Mustafa) (Rosni, Francis Tan & Ho) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an after trial appeal relating to a sale and purchase agreement of quarry operations in Bera, Pahang Darul Makmur.

[2] The appellant/defendant and respondent/plaintiff are both Malaysian private limited companies.

[3] We heard the appeal on 18 October 2023 and thereafter adjourned our decision to deliberate upon the submissions put forth by the parties.

[4] Now having done so, we give our decision below and supporting grounds thereof.

BACKGROUND

[5] The subject matter of the dispute concerned a rock quarry ('the land') whereby JRNT Niaga Sdn Bhd ('JRNT') has temporary occupational license with quarrying rights.

[6] By an agreement made between the respondent and JRNT dated 22 March 2011, the respondent was given the right to carry out quarrying operations on 40 acres of the land. The 40 acres of land comprised of an area of 30 acres ('Lot A') and another area of ten acres ('Lot X').

[7] In June 2016, the respondent went into financial difficulties and decided to sell its right in carrying out the quarrying operation as well as its quarrying assets such as machineries, equipment and plant.

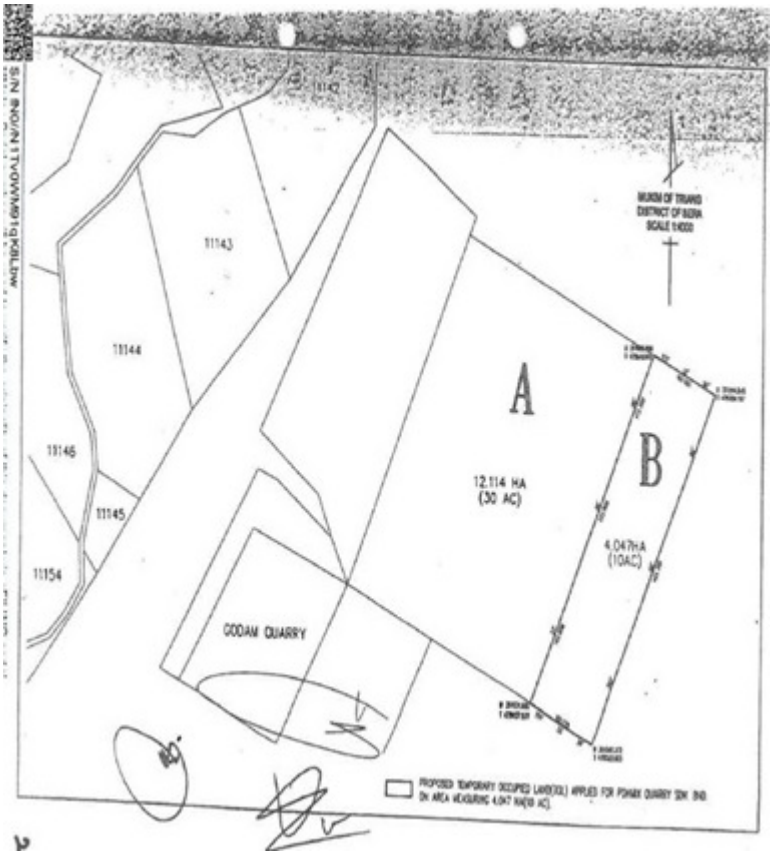
[8] The appellant was approached by the respondent and negotiations took place on the sale of the quarrying operation and assets.

[9] As a result, the appellant appointed a surveyor to carry out a survey on the land.

[10] Upon the conclusion of the survey, the appellant notified the respondent that the appellant is interested in Lot A but not Lot X and requested the respondent to source for an alternative area equivalent to the size of Lot X.

[11] Consequently, the respondent identified another area of ten acres ('Lot B') which is adjacent to Lot A and caused JRNT to apply to the Bera land office for a new temporary occupational license to be granted for Lot B.

[12] The parties thereafter on 3 November 2016 executed a sale and purchase agreement ('SPA') for the sale of the quarrying operation and assets of Lot A and Lot B at the consideration of RM4,075,000.00. The map of the quarry showing Lot A and Lot B is reproduced below:



[13] Upon the execution of the SPA, the appellant paid the respondent the sum of RM600,000 pursuant to the SPA and the quarrying operation of Lot A was handed over by the respondent to the appellant on the same day.

[14] Subsequently, the appellant further paid the respondent several times totaling to RM960,000.

[15] The temporary occupational license for Lot B was obtained on 28 March 2018 and the respondent hence requested for payment of the balance purchase price of RM2,559.500 due from the appellant pursuant to the SPA computed as follows:

Purchase price inclusive of GST @ 6%		RM4,319,500
Less		
Deposit:	RM10,000 (3 October 2016)	
Payment:	RM600,000 (4 November 2016)	
	RM100,000 (23 December 2016)	
	RM250,000 (16 January 2017)	
	RM960,000	
Contra from supply of stones quarried:	RM800,000	RM1,760,000
Balance outstanding		RM2,559,500

[16] However, the appellant discovered that Lot B is not in pristine condition but has been quarried already by five acres. According to the appellant, this was made known to the respondent at a meeting held at Kelab Rahman Putra but was denied by the respondent.

[17] There were thereafter negotiations between the parties for a discount on the purchase price but to no fruition.

[18] After an independent survey of Lot B was carried out, the appellant on 13 November 2018 wrote to the respondent that Lot A and Lot B were made up of divisible contracts having consideration of RM1.2m and RM2,875,000 each with their own condition precedent prescribed in the SPA respectively. By reason of the non-pristine condition of Lot B that was already quarried as

found, the appellant accordingly rescinded the second Lot B contract notwithstanding that the first Lot A contract was being performed.

[19] The respondent refuted the appellant's stand and therefore claimed against the appellant the sum of RM2,528,162.45 computed as follows:

Balance purchase price		RM2,559,500
Less		
Assignment of debt to:		
Poh Teik Enterprise Sdn Bhd	RM56,037.62	
Pohmix Sdn Bhd	RM31,875.66	RM87,913.28
		RM2,471,586.72
Add		
Transportation charges	RM8,421.40	
Value of stones not supplied	RM48,154.33	RM56,575.73
Amount claimed in the proceedings		RM2,528,162.45

[20] Since the appellant failed, refused or neglected to pay the respondent as claimed, the appellant instituted the suit in the High Court ('the suit')

IN THE HIGH COURT

[21] The respondent in the suit pursued its claim for debt overdue pursuant to the SPA and prayed as follows in para 15 of the statement of claim in Bahasa Malaysia:

> 15. Maka Plaintif memohon penghakiman terhadap Defendan untuk:
>
> (a) Pembayaran RM2,528,162.45 tersebut;
>
> (b) Faedah keatas jumlah RM2,528,162.45 tersebut pada kadar 5% setahun dari tarikh Writ difailkan sehingga penyelesaian sepenuhnya;
>
> (c) Kos; dan
>
> (d) Lain-lain relief yang Mahkamah dapati sesuai dan manfaat.

[22] In defense, the appellant opposed the claim premised on severability of contract and more pertinently negligent misrepresentation that Lot B is in pristine and unquarried condition by the respondent. Thus, the appellant is entitled to terminate the SPA. Accordingly, the appellant counterclaimed and prayed as follows in para 42 of the statement of defence and counterclaim in Bahasa Malaysia:

> 42. Oleh itu Defendan dengan hormatnya menurut perintah-perintah dan/atau relif-relif berikut:

42.1 Satu Deklarasi bahawa SPA Payung (sic) bertarikh 03.11.2016 adalah terdiri daripada dua kontrak yang berbeza dan berasingan, SPA Pertama dan SPA Kedua. SPA Pertama adalah untuk jual dan beli Kawasan Kuari Pertama dan untuk harga RM1,200,000.00 tidak termasuk GST; dan SPA Kedua untukjual dan beli Kawasan Kuari Kedua untuk harga RM2,875,000.00 tidak termasuk GST;

42.2 Satu Deklarasi bahawa SPA Pertama telah disempurnakan secara keseluruhannya;

42.3 Satu Deklarasi bahawa SPA Kedua adalah dibatalkan pada 13.11.2018 atas sebab salah nyata yang cuai;

42.4 Alternatifnya, satu deklarasi bahawa SPA Kedua adalah dibatalkan dan dimansuhkan tertakluk kepada Seksyen 34 Akta Spesifik Relif (1950);

42.5 Keseluruhan tuntutan Plaintif berhubungan dengan Pernyataan Tuntutan Terpinda ditolak;

42.6 Pembayaran balik jumlah bali yang telah dibayar untuk kawasan Kuari Kedua sebanyak RM431,424.27 (Perenggan 41 di atas dirujukkan);

42.7 Faedah sebanyak RM 1.5% sebulan terhadap RM431,424.27 daripaa 20.07.2017 sehingga tarikh pembayaran sepenuh (Perenggan 41 di atas dirujukkan);

42.8 Ganti rugi Khas sebanyak RM8,000.00 sebagai kos yang dialami untuk mengupah juruukur berdaftar berdikari supaya mengukur dengan teliti Kawasan Kuari Kedua, akibat salah nyata Plaintif secara cuai;

42.9 Gantirugi am untuk dinilai;

42.10 Kos; dan

42.11 Lain-lain perintah atau relif yang Mahkamah yang Mulia ini berpendapat sesuai dan adil untuk memberi.

[23] After trial, the learned judicial commissioner allowed the respondent's claim and dismissed the appellant's counterclaim.

[24] The learned judicial commissioner held as follows in her comprehensive and well analysed grounds of judgment ('judgment') reported in *Pohmix Sdn Bhd v QVC Rock Products Sdn Bhd* [2022] MLJU 1147; [2022] CLJU 1127 (HC) with emphasis added by us:

Single/unified contract or divisible contract

[43] *The material terms referred to above, strongly suggests as submitted by the plaintiff, that the entire quarry operation and assets was sold as one sale for one price. I am convinced that it is to be so construed.*

[44] *The evidence adduced at the trial supports this construction as well.* At the trial, it was established that the plaintiff, having ceased their quarry operations two to three months hence, wanted to sell their entire quarry operations which comprised of Lot

A, Lot X and other assets. The initial price the directors agreed upon was RM5m.

[45] When the defendant through DW3 was approached, he evinced interest but subsequently requested for Lot B instead. After negotiations, the final price agreed upon was RM4,075,000. This agreement of the parties was subsequently reduced into the SPA. The SPA does not provide for separate pricing for Lot A and Lot B. There is no price tag of RM1.2m for Lot A, and it is not for this court to read into the agreement a term which is clearly nonexistent.

[46] The defendant placed great reliance on the draft SPA to show the parties intended Lot A to have a price of RM1.2m. This reliance is misconceived when the parties had reduced the contract into writing (see: s 92 of the Contracts Act 1950). The terms in the draft SPA are now irrelevant. Further, the history of the SPA is of no value when the terms of the SPA are clear and unambiguous. There is no necessity to refer to extrinsic evidence to show the intention of the parties.

[47] DW3, who signed the SPA on behalf of the defendant, agreed in cross-examination that the initial sale price offered to him was RM5m. He also conceded that the defendant wanted to buy Lot A and Lot B and the other assets comprising of machineries, plants and equipment at the price of RM4,075,000. His evidence corroborated that of PW1 who gave an account of the negotiations prior to execution of the SPA. DW3 also agreed to the suggestion by the plaintiff's counsel in cross-examination that from the time he executed the SPA he had never questioned the correctness of it.

[48] *Contrary to the submission of the defendant, the fact that separate delivery timelines and completion dates were provided for Lot A and Lot B, does not support the case for distinct contracts. The factual matrix would clarify why it was provided for in that manner. Lot A had been issued a TOL at the time of the SPA, unlike Lot B. The plaintiff could not have delivered Lot B to the defendant until the TOL was obtained, which was only issued on 18 April 2018. It made commercial sense for parties to provide that the balance purchase price of RM2,875,000 was not due until the TOL for Lot B was issued. It made commercial sense for parties to provide that the balance purchase price of RM2,875,000 was not due until the TOL for Lot B was issued.*

[49] *Factually, the price of RM1.2m for Lot A does not stand up to logic. At the time of the SPA, the size of Lot A was 30 acres, and it had a quarry life of 17 years left. By simple mathematical calculation, this would mean approximately 22 acres of rockface left in Lot A. Lot B, on the other hand was only ten acres in size. It is implausible for Lot B to have a value of RM2,875,000 in comparison to Lot A's value of RM1.2m as alleged.*

[50] In addition, PW1's testimony was that the other assets itself is valued at more than RM1.2m. They comprise of a three crusher machines valued at RM750,000, a laboratory RM150,000, weighbridge RM100,000, two buildings and a meeting room RM50,000, an empty container RM10,000, TNB substation double chamber RM60,000 and two generators RM250,000. His evidence in this respect was not challenged. The total value of these assets would come to RM1,370,000. I therefore find the contention that quarry operations for Lot A was priced at only RM1.2m, unbelievable.

[51] *Had the parties intended to purchase the quarry operations separately with a different price tag attached to it, they would have provided for it in two separate agreements, or at the very least, provide for it clearly and expressly in a single agreement.*

[52] *Ultimately the question of whether the contract is divisible or singular is one to be decided upon the particular facts and circumstances of the case at hand, the terms of the contract and the nature of the property* (see: *South Asia Noble Sdn Bhd v Corak Prospek Binaan Sdn Bhd & Anor* [2018] MLJU 1260; [2018] 1 LNS 1324). The terms and the established facts point to a singular contract for both Lot A and Lots B.

[53] *Upon considering the terms of the SPA in the context of the evidence adduced, I find no merit in the contention of the defendant that Lot B is governed by a separate contract. On the other hand, I am of the view that the SPA dated 3 November 2016 executed by the parties is a singular contract comprising Lot A, Lot B and the other assets*.

[54] I shall deal with one other point related to the defendant's contention that Lot B is subject to a separate contract.

[55] The defendant contends that as Lot B is governed by separate and independent condition precedents from that of Lot A, the plaintiff must first establish that these conditions have been fulfilled before it is entitled to succeed in its claim. The defendant says it has not.

[56] In reliance on this point, the defendant refers to cl 5.3.1 of the SPA. The clause reads:

> 5.3 The Vendor shall fulfill and comply with the Second Condition Precedent within EIGHTEEN (18) CALENDAR MONTHS from the date of this Agreement or such further extension of time as may be granted by the Purchaser to the Vendor.
>
> > 5.3.1. Upon the obtainment of the written approval of the relevant authorities for the Additional Quarry Area to be included into the TOL within the aforesaid time or such further extension of time as may be granted by the Purchaser to the Vendor, the Purchaser shall be entitled to a further SIXTY (60) DAYS period to conduct a due diligence to ascertain the integrity and correctness of the said approval. The effective date ('the Effective Date') of the compliance of the Second Condition Precedent shall begin after the said 60 Day period.

[57] The crucial phrase relied on by the defendant is 'to be included into the TOL' as JRNT was the licence holder for the TOL, being the landowner, the defendant submits that the phrase must mean that JRNT has agreed to allow the defendant to quarry Lot B by a separate agreement, as in the case of Lot A. Until and unless the plaintiff shows by evidence that it had been done, the condition precedent applicable for Lot B has not been fulfilled. Consequently, the claim for the purchase price for Lot B is both premature and unfounded.

[58] I find that this point, if it was material enough to be raised by the defendant in the course of submissions, ought to have been specifically pleaded. Having perused the entire amended defence and amended counterclaim dated 30 November 2018, I find no reference to the condition precedent for Lot B having been unfulfilled in the manner submitted.

...

Misrepresentation

[64] *The fact that Lot B has been quarried is heavily relied on by the defendant for its*

case on negligent misrepresentation. The particulars of misrepresentation have been set out in para 25 of the amended defence. As the particulars are material, I propose to set them out as pleaded:

Particulars of misrepresentation

25.1 The Defendant contends that the Plaintiff had negligently represented to the Defendant that the Second Quarry Area was unoccupied and untouched at the time of the visit so as to misrepresent to the Defendant of the potential yield.

25.2 The Plaintiff did not do a proper survey and/or boundary survey of the Second Quarry Area, to ensure that they were properly representing the correct delineated area to the Defendant at all material times.

25.3 The representation made by the Plaintiff was clearly false and misleading, as the Plaintiff has already carried out extensive quarry work spanning across at least 2.4 acres at the Second Quarry Area.

25.4 At all material times, the Plaintiff had failed to disclose the true demarcation, delineation and orientation to the Defendant properly of the Second Quarry Area so as to misrepresent to the Defendant of the potential yield and/or accessibility of it.

25.5 The Plaintiff has failed to disclose or was negligent in not adducing the material fact of the 2.4 acres being extracted at the Second Quarry Area, despite knowing that, or should have reasonably known that it would adversely affect the business decision and desire of the Defendant, whose business heavily depends on the potential/actual yield of the quarry products, to enter into the Second SPA under the Umbrella SPA.

[65] *The entire tenor of the alleged misrepresentation suggests that the plaintiff was aware that Lot B had been quarried. For the defendant's defence of misrepresentation to succeed, there must be evidence that the plaintiff, through its representative, had expressly made representations to the defendant that Lot B was unquarried*.

[66] *Quite apart from defendant's pleaded case as to the alleged misrepresentation as set out in para 25 of the amended defence, there must be evidence on who made the representation and to whom was the representation made*.

[67] *However, I find the defendant's evidence to establish the misrepresentation as set out in para 25 of the amended defence is lacking. This to me, is essential to the proof of misrepresentation as alleged*.

[68] *The plaintiff's explanation as to the quarried area was that it was a genuine unintended mistake, which was not realised at the time of the execution of the SPA. It had no knowledge that when the quarry operations was owned by the plaintiff there was quarrying work that encroached into Lot B. Lot A and Lot B are contiguous lots, with Lot B situated above Lot A*.

[69] The evidence at the trial was this. PW1, who had a shot firer's licence, testified that he used to work for the plaintiff. However, after the plaintiff's quarry operations was bought over by the defendant, he commenced employment with the defendant from 15 November 2016 until 31 June 2020. He was responsible to supervise the blasting operations of the defendant. The last blast he supervised for

the defendant was on 23 March 2018. This fact was support with documents evidencing the purchase of explosives by the defendant. Blasting stopped after PW1 learnt that the blasting had encroached a little into Lot B. Although the blasting done was intended for Lot A, it encroached into Lot B because both Lot A and Lot B shared the same boundary.

[70] His testimony when the trial started in March 2021 was that the quarried area was the result of the defendant's own quarrying activities after the execution of the SPA. However, on 28 September 2021, when the hearing of this case resumed, Mr Francis Tan counsel for the plaintiff, informed the court that he was instructed that the plaintiff wished to concede to the fact that the part of the encroachment into Lot B had occurred when the plaintiff owned Lot A. PW1 was then called to the stand to state this fact on oath.

[71] I reproduce the relevant portion of the notes of evidence in examination in chief as well as cross examination of PW1 to clarify the issue of encroachment as follows:

> KAU: Ya, saya balik fikir dan berkaji memang confirm apa nama logik Pohmix Kuari sebelum ini sudah ambil Berm 1, 2, 3. Dan dilanjut oleh QVC semasa saya bekerja dengan QVC.
>
> ...
>
> Apabila saya balik dari bicara kes yang lalu, saya balik berfikir and mengkaji, kemudian saya sedari, memang, sememangnya Pohmix Kuari sebelum ini telah mencerobohi dari Berm 1, 2, 3.
>
> ...
>
> Ya, itu saya dengan sejujurnya saya minta maaf, saya, keterangan itu saya terlupa yang Berm atas 3, 2, 1 itu diceroboh oleh Pohmix.

[72] PW1 candidly conceded that upon further reflection on the matter of encroachment, as Bench 4 was quarried by the defendant, the logical deduction was that the plaintiff must have quarried Bench 1, 2 and 3 of Lot B. It was not disputed that the extraction technique employed in this quarry operation was to extract from the top and then move gradually down the benches.

[73] His evidence that the defendant quarried Bench 4 was substantiated by documentary evidence of explosives were bought on 23 March 2018. PW1 also said that any explosives purchased must be utilised on the same day. He was certain that the blasting on 28 March 2018 encroached onto Lot B. When asked as to why Lot B was quarried when the TOL had not been issued at the material time, he said, 'Ini adalah satu kesilapan yang jujur memandangkan Lot A dan Lot B merupakan bahagian bukit yang sama. Dan pada ketika itu, kami tidak sedar bahawa kami telah memasuki sedikit ke dalam Lot B. Kami ingat pada masa itu bahawa kami masih membuat letupan dalam Kawasan Lot A'. I have no reason to doubt the plaintiff's version of events, and this leads me to conclude that both parties had in fact unwittingly caused the quarried area of Lot B.

[74] However, the fact of encroachment into Lot B by the plaintiff before the SPA was entered into was made much of by the defendant. The defendant contends that in view of the concession, PW1's credibility is seriously called into question.

[75] I do not consider the concession to be material on the issue of misrepresentation. PW1's concession merely established the fact that part of Lot B had been quarried by both plaintiff and the defendant. PW1 did not go so far as to admit that he had personal knowledge that Lot B had been quarried before the SPA was entered into.

[76] *Having observed PW1 and his demeanour throughout his entire testimony during the trial, I find him to be a truthful witness who was prepared to make a candid concession notwithstanding it would contradict his earlier evidence. I am persuaded to believe his evidence that the encroachment into Lot B by the plaintiff was not a fact he was aware of until the trial.*

[77] *Following the concession however, the defence attempted to use this fact to strengthen its case of misrepresentation by referring to the provisions of Recital (E) of the SPA in its written submission. The defendant alleged that the plaintiff had breached the fundamental terms of the SPA by failing to deliver the complete rockface of Lot B, and had misrepresented to the defendant on the fact of complete rockface so as to induce the defendant to enter into the SPA.*

[78] For ease of reference Recital (E) is again reproduced:

> (E) The Vendor has agreed to sell and dispose and the Purchaser agreed to purchase and acquire from the Vendor the Quarry Operation together with complete rockface in the Land at the purchase price of Ringgit Malaysia Four Million and Seventy-Five Thousand (RM4,075,000.00) only free from all encumbrances upon the terms and subject to the conditions hereinafter appearing.

[79] As far as the breach of fundamental term is concerned, it was never the defendant's pleaded defence. As for its case of misrepresentation, non-compliance of Recital (E) was not in the pleaded particulars of misrepresentation.

[80] In any event, the term 'complete rockface in the land' in Recital (E) to my mind, merely means the whole of the piece of quarry land comprising of Lot A and Lot B. At the time of the SPA, Lot A had already been quarried for six years, and it would make no sense to for Lot A to be referred to as complete rockface as contended by the defendant.

[81] *Although the defence cross-examined PW1 extensively on the site visit where he showed the defendant's representatives the estimated location of Lot B, none of the plaintiff's witnesses were cross-examined on any representation made on the quality and condition of Lot B*. Instead PW1 categorically denied having made any representation to the defendant on the condition of Lot B.

...

[82] *The onus is lies on the defendant to prove, by convincing evidence, that the plaintiff misrepresented to the defendant before it can have any recourse in law* ...

[83] *Without evidence as to any representation, I am unable to see how the question of misrepresentation can arise. In any event I do not find misrepresentation to have been proven in the manner pleaded in the amended defence of the defendant.*

Caveat emptor

A [84] In the absence of misrepresentation, the plaintiff submits that the principle of caveat emptor applies. The defendant ought to be aware of what it was buying. The defendant has to take the responsibility of Lot B not being what it expected. I agree with the plaintiff's submission.

...

B [88] *The defendant submitted that it had exercised reasonable diligence before executing the SPA. It engaged a qualified land surveyor to purchase the plan and drawings of both quarry sites from the Bera District Land Office to confirm the orientation and measurement of Lot B.*

C [89] *This to me, is not the inspection expected of a prudent purchaser of quarry operations. The defendant, having engaged a land surveyor to purchase the drawings, ought to have requested the surveyor to do a visual investigation to ascertain the physical condition of Lot B. Instead, the defendant only did so after the SPA was signed and after the meeting on 3 July 2018 when the matter of encroachment on Lot B was raised. Prisma Survey Consultants was then commissioned to conduct a survey. Its report dated* D *31 October 2018 confirmed that an area of 2.4 acres had been quarried. This report was then relied on by the defendant to rescind the contract for Lot B.*

[90] *At the trial, the defendant adduced evidence by way of videos of the area surrounding Lot A and Lot B. These videos were taken by using drones. The plaintiff submits that the defendant could easily have used the same technology and resources to* E *investigate the condition of Lot B prior to signing the SPA, especially when it was the defendant who specifically requested for Lot B as it was not interested in Lot X. I find merit in the submission.*

[91] *At the very least, the defendant should have requested that a boundary survey be done as Lot A and Lot B shared a common boundary. Had it done so, I have no doubt the* F *quarried area of Lot B would have been discovered, as was.*

[92] *Since they did not do so, and guided by the principles enunciated by the apex court in Bayangan Sepadu Sdn Bhd, I find the principle of caveat emptor to apply to the defendant. It has to take Lot B as it finds it, having failed to make reasonable inspection prior to purchasing it.*

G

[25] The appellant is dissatisfied with the decision of the High Court and has on 20 April 2022 appealed to the Court of Appeal.

FINDINGS OF THIS COURT

H

[26] Before us, we find that the appellant in its memorandum of appeal and submissions, both written and oral, primarily advanced the same arguments put forth in the High Court. In gist, the appellant broached on the divisibility of the contract under the umbrella SPA and negligent misrepresentation issues. I Additionally, the appellant also raised that the SPA has been tainted with illegality.

[27] Our duty and function as an appellate court is that of review as encapsulated in the following dicta of Mohamed Dzaiddin Abdullah FCJ (later

CJ) in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 (FC) with emphasis added by us:

> In the light of the above findings of the learned judge, a fundamental question can interfere with the findings of fact of the court below.
>
> *It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a Court of Appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (Crofter Hand Woven Harris Tweed Co Ltd v Veitch and Another)* [1942] 1 All ER 142 (HL) per Lord Porter at p 167.
>
> However, the authority for the above proposition is the speech of Lord Thankerton in *Watt or Thomas v Thomas* [1947] AC 484, particularly the following passage (at pp 487–488):
>
> (a) where a question of fact has been tried by judge without a jury, and there is no question of misdirection of himself by the judge, *an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion*;
>
> (b) *the appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence*;
>
> (c) *the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court*.
>
> On the other hand, there is a clear authority also from the House of Lords and followed by the Privy Council, which says that a distinction can be drawn between finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former.

Furthermore, and more recently in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 (FC), Zabariah Mohd Yusof FCJ held as follows also with emphasis added by us:

> [33] *It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong* (the Supreme Court of United Kingdom in *McGraddie v McGraddie and another* [2013] 1 WLR 2472).
>
> [34] *The 'plainly wrong' test operates on the principle that the trial court has had the*

advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acts on the printed records. The test was pioneered by the House of Lords in *Clarke v Edinburgh and District Tramways Co* [1919] SC (HL) 35, when it adjudicated on the ability of an appellate court to reconsider the facts of a particular case, when there is already findings of fact by the lower court. In this regard, Lord Shaw's judgment is pertinent when His Lordship said:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? *In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case in a position, not having those privileges, to come to clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment*. (Emphasis added.)

[60] The aforesaid cases illustrate the highly deferential attitude adopted by appellate courts in the United Kingdom towards reviewing findings of fact by the trial court. *The test is not whether the higher court feels that it would have reached a different conclusion on the same facts as the trial court, but whether or not the decision by the lower court on findings of fact was reasonable. In other words, if the trial judge's decision can be reasonably explained and justified, then appellate courts should refrain from intervention*.

[28] In respect of the first issue of the SPA being a divisible contract, this is plainly an issue of construction of contract.

[29] The relevant provisions in the SPA are as follows:

> WHEREAS:
>
> ...
>
> (E) The Vendor has agreed to sell and dispose and the Purchaser agreed to purchase and acquire from the vendor the Quarry Operation together with complete rockface in the Land for extraction of Quarry Products and all machinery, equipment, apparatus, buildings and tools situated or kept on the Land and used in the Quarry Operation, more particularly stated and described in the Schedule

annexed hereto (hereinafter collectively referred as 'the Machinery and Equipment') at the purchase price of Ringgit Malaysia Four Million and Seventy-five Thousand (RM4,075,000.00) only free from all encumbrances upon the terms and subject to the conditions hereinafter appearing.

NOW IT IS HEREBY AGREED as follows:

1. Interpretation

1.1 In this Agreement, unless the context otherwise requires:

...

'Land' means the First Quarry Area at Bukit Cina (Bukit Mendi), Mukim Triang, Daerah Bera, Pahang measuring approximately 12.14 hectares in area to extract granite quarry or Quarry Products from the Land and the Additional Quarry Area measuring approximately 4.046 hectares (10 acres) which the Vendor has applied for to be included into the TOL.

'Purchase Price' means the sum of Ringgit Malaysia Four Million and Seventy-five Thousand (RM4,075,000.00) only which the Purchaser agrees to pay the Vendor in the acquisition of the Quarry Operation and the Machinery and Equipment.

3. Consideration

The total consideration for the disposal and acquisition of whole of the Quarry Operation and the Machinery and Equipment shall be the sum of Ringgit Malaysia Four Million and Seventy-five Thousand (RM 4,075,000.00) only (hereinafter referred to as 'the Purchase Price'). The parties hereto hereby acknowledge and confirm that the Purchase Price has been arrived at between them on the basis of a willing buyer and a willing seller.

4. Mode of Payment

The Purchase Price shall be paid by the Purchaser to the Vendor in the following manner and times:

(a) The sum of Ringgit Malaysia Six Hundred Thousand (RM600,000.00) only (hereinafter referred to as 'The First Payment') upon execution of this Agreement as part payment towards account of the Purchase Price (the receipt whereof the Vendor hereby expressly acknowledges); and

(b) The further sum of Ringgit Malaysia Six Hundred Thousand (RM600,000.00) only (hereinafter referred as 'the Second Payment') to the Vendor in the following manner and times:

(i) By way of contra/set off against the sum of Ringgit Malaysia Fifty Thousand (RM50,000.00) only (hereinafter referred to as 'the First Contra Sum') from the Second Payment being the value of the Purchaser's supply of Quarry Products or productions to the Vendor from time to time to the value equivalent to the First Contra Sum; and

(ii) The balance of the Second Payment thereof amounting to Ringgit Malaysia Five Hundred Fifty thousand (RM550,000.00) only within Thirty (30) days from the date of compliance with the First Condition Precedent.

(c) The balance Purchase price of Ringgit Malaysia Two Million and Eight Hundred and Seventy-Five Thousand (RM 2,875,000.00) only shall be paid in the following manner:

(i) A sum of Ringgit Malaysia Seven Hundred and Fifty Thousand (RM750,000.00) only (hereinafter referred to as the 'Second Contra Sum') from the balance Purchase Price being the value of the Purchaser's supply of Quarry Products or productions of the vendor from time to time up to the value equivalent to the Second Contra Sum;

(ii) The balance of Ringgit Malaysia Two Million and One Hundred and Twenty-Five Thousand (RM2,125,000.00) only shall be paid to the Vendor within 30 Days from the compliance of the Effective date referred to in Clause 5.3.1 below.

Upon full payment of the Purchase Price by the Purchaser to the Vendor in accordance with the provisions of this Agreement, the Vendor shall have no right whatsoever whether legal or equitable or otherwise in the Quarry Operations and the Machinery and Equipment and shall not in any way whatsoever interfere with the Quarry Operations on the Land.

5. Conditions Precedent

5.1 It is hereby expressly agreed between the parties hereto that the Vendor shall use its best endeavours to comply, fulfil and procure the Conditions Precedent referred to in Recital F hereof on the execution of this Agreement. For proposes of complying with the Conditions Precedent, the parties hereto hereby expressly agree covenant and undertake with each other to expeditiously execute and submits all such forms and documents and furnish all necessary information and particulars as may be required and necessary for the aforesaid fulfillment.

5.2. The Vendor shall fulfill and comply with the Condition Precedent in Recital F(iii) i.e. procure the Licensee to renew or extend the current TOL in respect of the said Land (expiring on 31st December 2016) for another Five (5) years from Pejabat Tanah dan Daerah Bera within 120 Days from the date of this agreement for such further extension of time as may be granted by the Purchaser to the Vendor, failing which the Purchaser shall have the option to terminate this Agreement by giving written notice to the Vendor and in such an event the Vendor shall forthwith within fourteen (14) days of receipt of such notice of termination, refund all monies paid to the Vendor pursuant to the provisions of this Agreement without interest and the Machinery and Equipment shall be forfeited by the Purchaser as agreed liquidated damages and whereupon this Agreement shall thereafter be null and void.

5.3 The Vendor shall fulfill and comply with the Second Condition Precedent within EIGHTEEN (18) CALENDAR MONTHS from the date of this Agreement or such further extension of time as may be granted by the Purchaser to the Vendor.

5.3.1 Upon the obtainment of the written approval of the relevant authorities for the Additional Quarry Area to be included into the TOL within the aforesaid time or such further extension of time as may be granted by the Purchaser to the Vendor, the Purchaser shall be entitled to a further SIXTY (60) DAYS period to

conduct a due diligence to ascertain the integrity and correctness of the said approval. The effective date ('the Effective Date') of the compliance of the Second Condition Precedent shall begin after the said 60 Day period.

5.3.2 If the Vendor fails to procure the written approval of the relevant authorities for the Additional Quarry Area to be included into the TOL within the aforesaid EIGHTEEN (18) CALENDAR MONTHS from the date of this Agreement or such further extension of time as may be granted by the Purchaser to the Vendor, the Purchaser shall be entitled to obtain the services of any other person to procure the same and in such case, if the written approval of the relevant authorities for the Additional Quarry Area to be included into the TOL has been successfully procured, the Purchaser shall within 30 days of receipt of the said approval, pay the Vendor an ex-gratia payment Ringgit Malaysia Five Hundred Thousand (RM5000,000.00) only.

5.4 For the avoidance of any doubt, as long as the approval relating to the Second Condition Precedent has been obtained within the aforesaid 18 calendar months, it shall be deemed to have been so procured under this Agreement and it shall be deemed that the Second Condition Precedent has been fully complied with.

5.5 This Agreement shall become unconditional when all the Conditions Precedent are fully complied with by the Vendor and the requisite Approval(s) and Permit(s) is forwarded to the Purchaser. For purposes of this Agreement, the date on which the Conditions Precedent are fully complied with by the Vendor shall be referred to as the 'Unconditional Date'.

...

15. Nature of Agreement

15.1 This Agreement contains the entire agreement between the parties hereto with respect to the subject matter hereof, supersedes all previous agreements and undertakings between the parties with respect thereto, and may not be modified except by an instrument in writing signed by the parties hereto or the duly authorised representatives of the parties hereto.

15.2 Each party acknowledges that, in entering into this Agreement, it does not do so on the basis of, and does not rely on, any representation, warranty or other provision except as expressly provided herein, and all conditions, warranties or other terms implied by statute or common law are hereby excluded to the fullest extent permitted by law.

15.3 Nothing in this Agreement shall create, or deemed to create a partnership or the relationship of employer and employee between the parties thereto. For avoidance of doubts, the purpose of this Agreement is strictly for sale and purchase of the Equipment and Products only. All liabilities incurred by the Vendor in respect of the said business prior to the date of this Agreement are the sole responsibility and continue to be the responsibility of the Vendor.

[30] The law on interpretation of contracts has been succinctly set out by Zainun Ali FCJ in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 (FC) as follows with emphasis added by us:

Principles of Construction

[26] The principles of interpretation of contract are as familiar as any canons of construction would be to legal practitioners.

[27] In recent times, the restatement of principles in the landmark case of *Investors Compensation Scheme Ltd v West Bromwich Building Society Respondents and Hopkin & Sons (a firm) and Others Respondents* [1998] 1 WLR 896, *pp 912–913 (ICS) provides a helpful starting point for the consideration of the relevant principles*. The judgment of Lord Hoffmann is as reproduced below, where His Lordship stated that:

> ... I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, pp 1384–1386 and *Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, is always sufficiently appreciated.

The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. *The principles may be summarised as follows*:

> (1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> (2) *The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> (3) *The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification*. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax* (see: *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1995] 1 WLR 1508.
>
> (5) *The 'rule' that words should be given their 'natural and ordinary meaning' reflects*

the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, p 201:

> *If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense*.

See also *Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors* [2021] 2 MLJ 374 (FC).

[31] The appellant strenuously contended that the SPA is a divisible contract that differentiated Lot A and Lot B notwithstanding that they have been housed in a single document. Towards this end, reliance is made on, amongst others, the cases of *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285; [1985] CLJ Rep 77 and *South Asia Noble Sdn Bhd v Corak Prospek Binaan Sdn Bhd & Anor* [2018] MLJU 1260; [2018] 1 LNS 1324. As a result, and since the contract for Lot A has been consummated, the appellant concluded that the contract for Lot B was terminated/voided on 13 November 2018 by reason of the misrepresentation made by the respondent.

[32] Consequently, we have carefully scrutinised paras [36] to [61] of the judgment particularly paras [51] and [52] thereof.

[33] There is no dispute that the entire agreement of both Lot A and Lot B is housed in the SPA and not in a separate agreement each for Lot A and Lot B.

[34] Since there is only a singular agreement, it is a question of law whether the contract is divisible or otherwise and that is dependent on the construction of the terms against the background facts and circumstances. Both the cases of *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* and *South Asia Noble Sdn Bhd v Corak Prospect Binaan Sdn Bhd* decide that in a divisible contract, there must be separate prices/consideration distinctly provided corresponding to each separate scope of obligation under the contract.

[35] Based on our interpretation of cl 3 of the SPA, there is no separate consideration provided for Lot A and Lot B respectively. The consideration therein is merely for a lump sum price of RM4,075,000 for quarrying operations of both Lot A and Lot B as well as purchase of machinery and equipment. We hence find that the appellant unilaterally attempted to allocate

RM1.2m and RM2,875,000 as consideration for quarrying operations of Lot A and Lot B respectively but that does not make reasonable business common sense in view of the size of Lot A and Lot B where the former is indisputably much larger than the latter. We are aware of the appellant's contention that the TOL of Lot A expired in 2016 and only renewed around July 2018 but that is in our view 'neither here nor there' without clear evidence from the appellant of the rock quantity that remains quarriable in Lot A to suggest that Lot B has a significant larger amount of quarriable rock than Lot A.

[36] We also find that the appellant actually equated the payment terms and condition precedent provisions in cll 4 and 5 of the SPA as consideration for the quarrying operations of Lot A and Lot B. However, based on our interpretation of these clauses, they deal with the timing of part payments of the lump sum consideration of RM4,075,000 prescribed in cl 3 of the SPA only. They do not and must not be confused of being the consideration for the quarrying operations of Lot A and Lot B.

[37] In the premises, we find and hold that the SPA is not a divisible contract and the learned judicial commissioner therefore did not make any appealable error that warrants our intervention.

[38] Next in respect of the second issue of negligent misrepresentation relied by the appellant, we have scrutinised paras [62] to [83] of the judgment particularly paras [81] to [83] thereof. We are mindful that the appellant's claim on misrepresentation is particularised in para [25] of its amended defence, viz negligent misrepresentation.

[39] We observed that the learned judicial commissioner primarily made a finding of fact that the appellant failed to discharge its burden of proof that the respondent misrepresented to the appellant by having made an unambiguous and false statement of fact addressed to the case of *Sim Thong Realty Sdn Bhd v The Kim Dar @ Tee Kim* [2003] 3 MLJ 460; [2003] 3 CLJ 227 (CA).

[40] It is trite that the appellate court pursuant to the plainly wrong test would not interfere with the primary findings of fact of the trial judge who enjoyed the audio-visual advantage in assessing the testimony of witnesses. We find from the appeal record that the learned judicial commissioner has thoroughly and properly considered and evaluated the evidence adduced by the parties.

[41] Be that as it may, we further find that the learned judicial commissioner has as a matter of law properly taken into account the application of caveat emptor in dismissing the appellant's contention of negligent misrepresentation in paras [87] to [92] of the judgment particularly paras [90] to [92] thereof

following the case of *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] 1 MLJ 701 (FC). See also *Richard Curtis & Co v Khatijah Abdul Majid* [2012] 7 CLJ 878.

[42] It is plain to us that the SPA is not a contract which is of *uberrimae fidei* (utmost good faith). Thus, the appellant must itself be aware and make its own requisite inspection and inquiry on both Lot A and Lot B including the physical nature of the sites before entering into the SPA. As a matter of fact, it was the appellant itself who identified and chose Lot B in lieu of Lot X. The failure of the appellant to carry out its physical visual inspection as well as preliminary survey of both Lot A and B is hence fatal to its pleaded claim based on negligent misrepresentation. We are mindful that the appellant attempted to rely on cl 5.3.1 of the SPA to argue that it has 60 days upon the issuance of the TOL to conduct a due diligence on Lot B but we find that the purpose of cl 5.3.1 is for legal due diligence on the title but not on the physical state or condition of Lot B. The facts of the case of *Gemakota Enterprise Sdn Bhd v Public Bank Bhd* [1998] MLJU 389; [1998] 4 CLJ Supp 476 relied on by the appellant are distinguishable.

[43] Additionally, we find that by cl 15.2 of the SPA, the appellant has covenanted non-reliance on any representation made by the respondent; thus, the appellant must be accordingly estopped from pleading and relying on negligent misrepresentation of the respondent as so pleaded.

[44] Consequently, it follows that the appellant's rescission or termination of the SPA on 13 November 2018 to deny payment to the respondent is baseless and accordingly bad.

[45] We are therefore again not persuaded by the contentions of the appellant before us that the learned judicial commissioner was plainly wrong to justify our intervention.

[46] Finally, we noted that the appellant has raised the issue of illegality which seemingly has not been raised in the High Court; thus, not dealt with by the learned judicial commissioner in the judgment. The crux of the appellant's contention here is that the SPA is tainted with illegality due and owing to the illegal quarrying activities on Lot B carried out there (as conceded by the appellant at trial) prior to the issuance of the temporary occupational license of Lot B. Reliance is made on the case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212 (FC).

[47] We have carefully perused the whole SPA but do not find that it is ex facie illegal or that the object and consideration thereof contravened s 24 of the

Contracts Act 1950 which provides:

> 24 What considerations and objects are lawful, and what not
>
> The consideration or object of an agreement is lawful, unless —
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

It is plain to us that the consideration of the SPA is purely commercial in nature, viz the sale of quarrying operations.

[48] That notwithstanding, we also find that even if there had been illegal quarrying as alleged by the appellant, the resultant consequence may subject the quarrying operator to criminal penalty under the relevant statutory laws but does not affect the sanctity or validity of the SPA (see: *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals* [2021] 3 MLJ 914; [2021] 2 CLJ 318 (FC)).

[49] In the premises, we do not find that appellate intervention is warranted in any way on this issue of illegality.

[50] Following from our findings in paras [37], [45] and [49] above, we find that the learned judicial commissioner has rightly found liability against the appellant in respect of the respondent's claim as well as dismissing the appellant's counterclaim. In so doing, we also find that the learned judicial commissioner has properly evaluated the amount claimed including having taken into account the assignment of debt owed by the appellant to the respondent's related companies following *Sabah Development Bank Berhad v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd)* [2020] MLJU 228) (FC).

CONCLUSION

[51] For the foregoing reasons, we unanimously dismiss the appeal with costs of RM30,000 subject to allocator. The judgment and order of the High Court dated 20 April 2022 is affirmed.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh